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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. ..... [redacted] 211

DETROIT VITAL FOODS, INC., LELORD KORDEL and ALFRED FELDTEN,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

DETROIT VITAL FOODS, INC., LELORD KORDEL and ALFRED FELDTEN,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Detroit Vital Foods, Inc., Lelord Kordel and Alfred Feldten, pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on May 4, 1970 which affirmed the judgments of conviction of the United States District Court for the Eastern District of Michigan, Southern Division, entered January 19, 1966.

Citations to Opinions Below

The pertinent opinions of the District Court are reprinted in Appendix A, *infra*, pp. 1-6, and have not been officially reported.

The first opinion and decision of the Court of Appeals was filed on February 20, 1969 and affirmed the judgment of conviction against Petitioner, Detroit Vital Foods, Inc.,

but reversed the judgments of conviction against Petitioners Kordel and Feldten. The opinion of the Court of Appeals is reported at 407 F. 2d 570.

On April 21, 1969 the Government filed a petition for certiorari to review the reversal of the convictions of Kordel and Feldten, and Detroit Vital Foods, Inc., petitioned for review of its affirmance. The petition of Detroit Vital Foods, Inc. was denied on June 3, 1969 [No. 1285 (October Term, 1968)],* but certiorari on the Government's petition was granted by this Court "to consider the questions raised by the Government's invocation of simultaneous civil and criminal proceedings in the enforcement of federal law" 395 U. S. 932. The judgment of the Court of Appeals with respect to petitioners Kordel and Feldten was reversed and the case remanded for proceedings consistent with the opinion of this Court, reported at *United States* v. *Kordel, et al.*, 80 S. Ct. 763, 38 U. S. L. W. 4153, February 24, 1970.

Petitioners then moved the Court of Appeals to consider the grounds of error relied upon by them, but expressly not resolved by the Court of Appeals in its prior opinion. Upon consideration of those grounds, but without setting forth reasons, the Court of Appeals, in an order entered May 4, 1970, ruled that they were without merit, and affirmed the judgments of conviction. The order of the Court of Appeals is reprinted in Appendix A, *infra*, pages 7; 8 and has not been officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 4, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

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* A Petition for rehearing of this Court's order denying Detroit Vital Foods, Inc.'s petition for certiorari was also denied. (March 9, 1970, No. 1285 October Term, 1968.)

Questions Presented

I. (a) Whether this Court's holding in *U. S.* v. *Costello*, 350 U. S. 359, authorizes return of indictments in the absence of any rationally persuasive evidence, or solely on hearsay evidence, where its character as hearsay has not been disclosed to the Grand Jury, and other evidence is readily available.

(b) Whether the taking of minutes of testimony before the Grand Jury should be made mandatory to prevent prosecutorial emasculation and evasion of a defendant's right to avail itself on cross-examination of contradictory or inconsistent statements by Government witnesses who testify before the Grand Jury and at the trial.

II. (a) Whether tape recordings obtained by electronic eavesdropping equipment surreptitiously placed upon petitioner's business premises without consent, without a warrant and by means of a trespass, prior to the time the premises were open to the public, should have been suppressed even though the tapes were recordings of public utterances.

(b) Whether petitioners are entitled to a remand to the District Court and a hearing to determine whether entry upon petitioner's business premises without a warrant or consent and by means of a trespass, for the purpose of placing electronic eavesdropping equipment on said premises, provided evidence or leads to evidence relevant to petitioners' conviction, from recorded private conversations.*

III. Whether the Trial Court's charge to the jury applying the Federal Aider and Abetter Statute (18

* Questions I (a) and II (a) and (b) were sought to be reviewed in the prior petition for certiorari filed by petitioner, Detroit Vital Foods, Inc. which this Court denied.

U. S. C. §2) to a case where criminal intent or willfulness is not an element of the crime charged in the indictment violated petitioner's constitutional rights under the Fifth Amendment.

IV. Whether the Trial Court's charge that an article of food which is intended to affect the structure or any function of the body of man, is also a "drug" within the meaning of Section 201 (g) (1) of the Federal Food, Drug and Cosmetic Act [21 U. S. C. 321 (g) (1)] is an erroneous statement and interpretation of the law and therefore constitutes reversible error.

V. Whether under the Federal Food Drug & Cosmetic Act, evidence of falsity of statements made during oral lectures is admissible to determine whether articles are offered as drugs.

Statutes Involved

There is here involved the Fourth Amendment and Fifth Amendment to the Constitution of the United States. The Constitutional provisions are reprinted in Appendix B, *infra*, page 1. There is also involved Title 21 Section 321 (g) (1) and Title 18 U. S. C. Section 2 both of which are reprinted in Appendix B, *infra*, pages 1-3.

Statement

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted on five counts of an indictment charging them with introducing into interstate commerce certain misbranded "drugs" (Frutex wafers, Lecigan granules, Aminex and Nutri-Time tablets) and with performing acts

which resulted in the misbranding of the "drug" Korleen while it was being held for sale after shipment in interstate commerce (21 U. S. C. 311 (a), (k)). Petitioner Kordel was sentenced to two years' imprisonment and a fine of $10,000; Petitioner Feldten was sentenced to imprisonment for one year, suspended to thirty days with three years' probation, and was fined $2,000; the corporate petitioner was fined $10,000.*

Detroit Vital Foods, Inc. is a Michigan corporation with its headquarters in Detroit. Petitioner Kordel was its president and Petitioner Feldten its treasurer. Kordel was the author of numerous books and leaflets promoting the use of vitamins and minerals as food supplements. Detroit Vital Foods, Inc. was the distributor of such products. As the Court of Appeals found, the evidence showed that during the years 1959-1961 Kordel traveled across the country delivering lectures in various cities on the importance of foods containing vitamins and minerals to proper nutrition and good health. The books and lectures contained discussions of the same topics. The company's products were sold at booths established in or near the lecture halls and were also available in health food stores generally. Feldten made no speeches but acted as Kordel's assistant. He sold the products at lectures and took orders for products to be shipped from Detroit.

The essence of the criminal charges against petitioners was that, as to some of the products, certain books and leaflets written by Kordel constituted part of the labelling and contained false and misleading statements. In addition, the indictment alleged, as to all counts on which

* Petitioners Feldten and Detroit Vital Foods, Inc. were found guilty of misdemeanors as first offenders. Petitioner Kordel was found guilty of felonies by virtue of his prior conviction for violation of Section 331. See, affirming the previous conviction, *Kordel v. United States*, 335 U. S. 345; see, also, 21 U. S. C. 333.

petitioners were convicted,* that the products sold by petitioners as food supplements were in fact "drugs" intended by them to be used for the prevention and treatment of various diseases and conditions and that the labeling for said "drugs" was deficient under 21 U. S. C. 352 (f) in that it failed to set forth adequate directions for use (*e.g.*, the dosage, frequency and duration of administration of each drug). The Government sought to prove Kordel's representations about the articles by introducing tape recordings of Kordel's public lectures.

The indictment was returned on August, 1963 after a Grand Jury session which lasted less than 20 minutes, hardly enough time to read, much less understand its technical and complex provisions. The indictment was carried into the Grand Jury room by George Fowler, the Deputy Director of the Detroit office of the Food and Drug Administration, and was prepared by Fowler's associate. Fowler was the only person who appeared before the Grand Jury.

None of the books or leaflets allegedly constituting the labelling material and none of the lectures delivered by the petitioner, Kordel, which formed the heart of the Government's case, were submitted to the Grand Jury. No experts were called to testify as to the truth or falsity or adequacy of the directions for use of the labelling and, indeed, not even the products were exhibited to the Grand Jury. In short, no evidence was presented, no witness who could testify as to the facts, and no books, records or papers were submitted to the Grand Jury. In fact, not even a court reporter was presented and no transcript

* Petitioners were convicted on counts 4, 8, 9, 10 and 11 of the indictment, which is set forth at pages 13a-17a and 26a-39a of petitioners' appendix in the Court below which is being filed as part of the record with the Clerk of this Court. References to this appendix are denoted by the letter (a).

of minutes was made, obviously because there was nothing to transcribe * (93a-100a).

While the Trial Judge was disturbed by the irregularities in method and time which were shown to have occurred in the instant case (111a), he denied the motion to dismiss the indictment on the theory that this Court's decision in the *Costello* case precluded him from dismissing an indictment under any and all circumstances and prohibited any inquiry into the evidence before the Grand Jury. In effect, the District Court construed this Court's holding in *Costello* as sanctioning the all too frequent practice wherein grand juries merely rubber stamp what the prosecutor has already determined (107a-111a), and without retaining or transcribing any record of the proceedings before the Grand Jury.

The Government also engaged in excessive and irregular investigative techniques involving electronic eavesdropping. The pertinent and undisputed facts concerning this electronic eavesdropping are as follows:

The indictment herein alleged that the products were misbranded in that their labelling failed to bear adequate directions for use for the purpose for which the products were intended to be used as manifested in various lectures sponsored by the corporate petitioner and delivered by petitioner Kordel. The Government sought to prove the contents of the lectures by tape recordings made with electronic recording equipment placed upon petitioners' business premises without either consent or warrant and by means of trespass, prior to the time the business premises had been open to the public and the lectures delivered.

Thus, FDA agents testified that certain premises of the Fort Wayne Hotel had been leased to petitioners and

* The only record of the Grand Jury proceedings was a looseleaf book notation reading as follows: "7-17-63 Lelord Kordel, George Fowler, Alfred Feldten, T. Bill (17)" (100a).

that before the lectures were open to the public the agents entered upon the premises, dropped a microphone down an air vent which was in the ceiling of the premises directly in front and above the lecture stand, ran wires out of the windows and across the roof of the second floor, and connected the wires to a tape recorder which had been set up in other rooms of the Hotel. The record further shows that the agents had gained access to the petitioners' leased premises before they were open to the public by flashing official credentials to the Assistant Manager of the Hotel and that they had entered the premises on another occasion prior to the time they were open to the public. The agents confirmed that the eavesdropping equipment was Government owned (225a-267a).

A similar access was made with respect to petitioners' business premises in the Masonic Temple. There, an FDA agent entered petitioner's leased premises before they were open to the public, obtained a tape recorder from the manager of the building and placed it in the manager's office which was in a room separate and apart from defendants' business premises (225a-227a).

Objection to the receipt in evidence of the recordings obtained in the foregoing manner was made to the Trial Judge on the ground that they were procured in violation of petitioners' constitutional rights under the 4th Amendment to be free from unreasonable searches and seizures (227a-260a). The Trial Judge denied the motion on the ground that the receipt in evidence of the recordings obtained in the manner aforementioned did not violate the petitioners' constitutional rights, notwithstanding that the recordings were obtained as a direct consequence of an unlawful trespass and physical intrusion into petitioners' business premises (231a, 260a-261a) without either a warrant or consent.

The facts pertinent to the Aider & Abettor question sought to be reviewed herein are:

The Trial Court charged the jury that the petitioners could be found guilty if they were aiders and abettors in the commission of any offense, and proceeded to give the usual charge with respect to the meaning of the term "aiding and abetting" (669a, 670a). Petitioners' exception to the charge was duly made (676a), not because it misstated the law as to the meaning of aider and abettor, but because the indictment had not charged petitioners, either in the language of 18 U. S. C. (2), or otherwise, with being aiders and abettors or with intent or wilful violations of the Act.

This charge also formed the basis of a motion for a new trial (697a) which the Trial Court denied (690a).

In giving the jury an "aider and abettor" charge, the Trial Court ruled that it was immaterial that specific intent or wilfulness were not elements of the offenses charged in the indictment and that the aider and abettor statute is automatically to be read as part of all indictments, even where the aider and abettor statute is not referred to in the indictment by specific statutory reference or by allegations of wilfulness or intent (692a-693a).

The facts pertaining to the question of statutory interpretation of whether a food can also be a drug are as follows:

Each of the counts in the indictment alleges that petitioners' food supplements were drugs within the meaning of the Act and as such were misbranded. Petitioners contended that the products involved were not drugs under 21 U. S. C. 321 (g) (1) but rather were intended to improve nutritional health, and at most, were offered to effect the structure and function of the body of man, and

as such, were foods, and therefore, were not misbranded as alleged in the indictment.

In connection with the foregoing, the Court charged that a product may be both a food and drug if it is offered for the cure, mitigation, treatment or prevention of disease (658a), but refused to give the charge requested by petitioners (641a) that if petitioners' food supplements were intended to effect the structure or any function of the body of man, the food supplements were not drugs under 21 U. S. C. 321 (g) (1) (c).

The facts pertaining to Question V sought to be reviewed herein are as follows:

Each count of the indictment alleges that the products involved were drugs within the meaning of the Act and that the labelling for said drugs failed to contain adequate directions for use for the purposes for which the articles were intended to be used and offered to the public, in violation of 21 U. S. C. §352 (f) (1).

During the course of the trial, the Government read extensive portions of the lectures delivered by petitioner Kordel and interrogated their expert witnesses as to the truth or falsity of the statements made in such lectures (i. e., 284a, 288a, 292a).

Defense counsel objected to such interrogation on the ground that truth or falsity of the lectures was not properly in issue on the charges in the indictment of misbranding in violation of 21 U. S. C. 352 (f) (1), i. e., inadequate directions for use, and that the lectures were admissible only to show the ostensible use for which Kordel intended the products. The District Court agreed that the lectures were in evidence to show intended use, and not truth or falsity of the statements contained therein (286a), but nevertheless proceeded to overrule the objection and allowed the Government to interrogate with re-

spect thereto. Defense counsel indicated a continuing objection to the entire line of questioning on the ground that such evidence was highly prejudicial and that counsel was not prepared to try the issue of the truth or falsity of Kordel's lectures.

Reason for Granting Writ as to Question I (a)

Question I (a) presents an issue of recurring significance and conflict between the Second and Sixth Circuit Courts of Appeal regarding the scope and application of this Court's holding in *U. S.* v. *Costello*, 350 U. S. 359 and the place which the Grand Jury system holds as an instrument of criminal justice for all persons accused of serious crimes.

In actual practice, all too many Grand Juries merely rubber stamp, without a transcript of the proceedings, what the prosecutor has already determined. (See note: *The Grand Jury—Its Investigatorial Powers and Limitations*, 37 Minn. L. Rev. 586.) It would be well, therefore, for this Court to delineate the role of our Grand Jury system as an instrument of justice and to clarify the authority of the District Court to dismiss indictments where the evidence before the Grand Jury rests exclusively upon no rationally persuasive evidence or hearsay evidence whose character as hearsay has not been disclosed to the Grand Jury and where other evidence is readily available.

In a line of cases, the Second Circuit has been severely critical of indictments based exclusively upon hearsay evidence where other evidence is readily available, or where the hearsay character of such evidence has not been disclosed to the Grand Jury.* (*U. S.* v. *Payton*, 363 F. 2d

* Failure to disclose to the Grand Jury that hearsay evidence is in fact hearsay is misleading (*U. S.* v. *Payton*, *supra*).

996, 999-1001 (dissenting opinion), *cert.* denied, 385 U. S. 993, 87 S. Ct. 606, 17 L. Ed. 2d 453 (1966); *U. S.* v. *Umans*, 368 F. 2d 725, 730 (1966), *cert.* granted 386 U. S. 940, 87 S. Ct. 975, 17 L. Ed. 2d 872 (1967), *cert.* dismissed as improvidently granted, 389 U. S. 80, 88 S. Ct. 253, 19 L. Ed. 2d 255 (1967); *U. S.* v. *Beltram*, 388 F. 2d 449, 451-454 (1968) dissenting opinion of Medina, J.; *U. S.* v. *Catino*, 403 F. 2d 491, 496, 497 (1968), opinion below, 282 F. Supp. 347 (S. D. N. Y. 1968), *U. S.* v. *Arcuri*, 405 F. 2d 691 (1968).

In *Arcuri* (*supra*) the Second Circuit repeated its warning to prosecutors, previously given in the *Umans* and *Catino* cases (*supra*), that indictments subsequent to the *Arcuri* opinion would be dismissed without a showing of prejudice to the defendant if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the Grand Jury. (*U. S.* v. *Arcuri*, *supra* at page 694).

The Court of Appeals for the Sixth Circuit, on the other hand, in the case at bar, has apparently held to the contrary. Here, the District Court's denial of petitioner's motion to dismiss the indictment stems from the Trial Judge's opinion that the *Costello* doctrine precluded him from dismissing an indictment under *any* and *all* circumstances—even where no rationally persuasive evidence or hearsay evidence had been presented. In rejecting this ground for petitioners' appeal, the Court of Appeals has accepted the District Court's rationale and thus is apparently in direct conflict with the Second Circuit.

The important role of our Grand Jury system as an instrument of justice has been eroded by government prosecutors who all too frequently prepare the indictment for submission to the Grand Jury which then merely rubber stamps it in hasty and almost cavalier fashion. In effect, the grand jury system has been read out of our Constitution by practices of which the instant case is

merely illustrative. The time has come, if it has not long since passed, wherein this Court should once again reaffirm the principles underlying our Grand Jury system in the light of the *Costello* holdings, so that persons aggrieved by irregular and unconstitutional Grand Jury practices may seek redress at the Trial Court level.

Reasons for Granting Writ as to Question I (b)

Question I (b) seeks to redress the frequently recurring practice of prosecutors in failing to cause a transcript to be made of the testimony of prosecution witnesses appearing before the Grand Jury whom the prosecutor intends also to use as witnesses at the trial.

Admittedly Rule 6(d) of the Federal Rules of Criminal Procedure has been construed by the Circuit Courts which have considered the question, to make the transcribing of testimony of witnesses before the Grand Jury permissive and not mandatory, *Loux* v. *United States*, 389 F. 2d 911 (C. A. 9, 1968) and cases cited therein *supra* at page 916.

Subsequent to the earlier holdings on this point, however, the courts enunciated the rule that a defendant is entitled to avail itself on cross examination of contradictory or inconsistent statements by government witnesses who testify before the Grand Jury and at the trial, *i.e.*, *United States* v. *Caruso*, 358 F. 2d 184 (C. A. 2, 1966); *United States* v. *Giampa*, 290 F. 2d 83 (C. A. 2, 1961).

As a result of this rule, and apparently for the purpose of denying a defendant his rights thereunder, the practice has developed in all too many cases of conducting Grand Jury proceedings without transcribing the testimony of key government witnesses who will also appear at the trial as a government witness.

This is precisely what occurred in the instant case. The sole person who appeared before the Grand Jury was

George Fowler, Deputy Director of the FDA Detroit Office. Fowler also appeared as a government witness at the trial. The record establishes herein that no transcript was made of his testimony before the Grand Jury; that the entire Grand Jury proceeding lasted approximately twenty minutes; that Fowler, ostensibly a government "witness", entered the Grand Jury room and presented to the Grand Jury an indictment prepared by Fowler's associate which was identical to the indictment returned twenty minutes later.

He brought with him into the Grand Jury room a complete file undoubtedly containing, at best, hearsay information and, at worst, no rationally persuasive evidence to support the offense since the record herein shows that neither the allegedly offending products, the allegedly false books, the alleged lectures indicating intended use, nor medical substantiation of the government's position were submitted to the Grand Jury.

Petitioners respectfully submit that this Court should fashion a rule requiring all Grand Jury proceedings to be properly recorded so as to safeguard a defendant's right of confrontation and to enable trial courts, as urged in point I (a) hereof, to effectively supervise the administration of criminal justice in relation to the constitutional necessity of indictment by proper Grand Jury proceedings.

Reason for Granting Writ as to Question II (a)

The facts herein show that FDA agents entered petitioners' business premises before they were open to the public, placed electronic eavesdropping equipment thereon, and thus trespassed and intruded upon petitioner's business premises. The exclusionary rule fashioned by this Court in *Weeks* v. *U. S.*, 232 US 383; *Mapp* v. *Ohio*, 367 US 643; *Silverthorne Lumber Co.* v. *U. S.*, 251 US 385,

391-392; *Silverman* v. *U. S.*, 265 US 505; and *Katz* v. *U. S.*, 389 US 347, excludes from a criminal trial evidence or fruits of evidence obtained from a defendant in violation of his 4th Amendment rights. *Alderman* v. *U. S.*, 394 US 165, 22 L. ed 2d, 176 (1969). Consequently, the tape recordings obtained from petitioner by means of the unlawful trespass and intrusion should have been suppressed. Under this Court's recent decisions in *Schipani* v. *U. S.*, 385 US 376 (1966); *Black* v. *U. S.*, 385 US 26, and *O'Brien* v. *U. S.*, 386 US 345, the use of a concealed monitoring device is sufficient, in and of itself, to require a new trial whether or not the tainted evidence was used. If that is so, then here, where the evidence was in fact used, a new trial should be granted. Moreover, it is immaterial that the recordings were made of public lectures, the contents of which might have been obtained through lawful means. As petitioners read this Court's decisions, what is at the heart and core of the Fourth Amendment protection is the existence of a trespass, *i.e.* an unlawful invasion and intrusion upon a citizen's personal or property rights and or the installation of secret electronic monitoring devices whether or not the evidence so obtained was used. This Court previously has dealt only with electronic eavesdropping of private conversations. It has not previously passed upon the issue here presented, namely, whether an unlawful trespass and intrusion on business premises can be utilized to obtain a recording of non-private conversations. Unless an exclusionary rule is fashioned under such circumstances, this Court will have sanctioned respect for lawless police action. The only remedy to deter lawless intrusions into private or business premises is to exclude evidence obtained by such means. "Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good and only when that point is driven home can the prosecutor be expected to emphasize the importance of observing Constitutional demands

in his instructions to the police." *Wolff* v. *Colorado*, 338 US 25, 44; *Weeks* v. *U. S.*, 232 US 392, 393.

In the instant case, there was absolutely no excuse or justification for Federal agents to break into petitioners' business premises since the evidence sought could very easily have been obtained by lawful means. Indeed, this very fact compels the conclusion that the lawless trespass and intrusion should not be validated.

Reason for Granting Writ as to Question II (b)

In the instant case, it is undisputed that electronic surveillance equipment was placed upon petitioners' business premises without consent or a warrant and by means of a trespass prior to the time the premises were open to the public. As such, petitioners are entitled to a remand to the District Court for proceedings consistent with this Court's opinion in *Alderman* v. *United States, supra.* The remand to the District Court will resolve the question of whether such unlawful surveillance *prior to the time the premises were open to the public resulted in monitoring of any private conversations*, or private discussions among and between petitioners and others which were relevant to petitioners' conviction. The granting of *certiorari* to review this aspect of the instant case will assure petitioners of the rights recognized by this Court in the *Alderman* case.

Reason for Granting Writ as to Question III

The indictment herein does not allege the commission of the misbranding offenses with "intent" or wilfulness.*

In giving the jury an "aider and abettor" charge, the Trial Court apparently believed that it was immaterial

* Criminal proceedings brought under the Federal Food, Drug and Cosmetic Act do not require proof of intent or wilfulness.

that specific intent or wilfulness were not elements of the offenses charged in the indictment and that the aider and abettor statute is automatically to be read as part of all indictments, even where the aider and abettor statute is not referred to in the indictment by specific statutory reference or by allegations (692a-693a).

In advancing the argument herein made, petitioners are not unmindful of the rule of law that indictments may be read as though 18 U. S. C. §2(a) and (b) were embodied in the indictment. *United States* v. *Lester*, 363 F. 2d 68 (C. A. 6, 1966). *This rule, however, has been applied only to offenses involving specific intent or wilfulness, and indeed, all of the decisions cited by the Trial Court to support its ruling* (692a) *involved just such offenses.*

As was pointed out in *Nye and Nissen* v. *United States*, 336 U. S. 613 (1948), at page 620:

> "Aiding and abetting has a broader application. It makes a defendant a principal when he *consciously* shares in any criminal act. . . ." (Emphasis added.)

Similarly, in *United States* v. *Peoni*, 100 F. 2d 401 (C. A. 4, 1938, L. Hand), at page 402, it was stated:

> "All the words used—even the most colorless 'abet' —carry an implication of *purposive* attitude towards it." (Emphasis added.)

It is thus clear, that where an indictment charges an offense in which the element of intent or wilfulness is alleged, the aider and abetter provisions of 18 U. S. C. §2(a) and the "wilfully causing" provisions of 18 U. S. C. Sec. 2(b), may be read into the indictment without changing the nature of the offense charged, without adding new elements thereto, and without violating the Constitutional provisions that an accused is entitled to be informed, with

reasonable specificity of the offense with which he has been charged.

In the instant case, however, the Trial Court's instruction to the jury that petitioners could be guilty as aiders and abetters upon an indictment which did not involve a specific intent crime, had the effect of allowing the jury to convict the petitioners of a charge on which they were never made to answer, and as such, violated petitioners' constitutional rights. *Cole* v. *State of Arkansas*, 333 U. S. 197 (1948).

To hold that the aider and abettor statute is automatically a part of an indictment which does not involve specific intent or wilfulness, would mean that a defendant could be convicted on proof that he had committed only one element of the crime, rather than all elements of the crime and, indeed, that is precisely the charge that the Trial Court gave the jury. Of course, where intent and wilfulness are elements of an indictment, constitutional rights are not violated where a defendant is convicted upon proof of participation in less than all of the elements of the crime, because the aider and abettor statute adds nothing additional to the offense as defined in the indictment. The aider and abetter statute, by its terms and by long standing decisional authorities, includes the elements of intent and wilfulness, and their inclusion into a specific intent offense does not materially change the offense charged nor obscure the elements.

Where, however, as in the instant case, the aider and abettor statute is read into an indictment which does not include specific intent as an element of the offense charged, the result is to allow a conviction upon a different crime and one which contains elements different from those constituting the offense defined in the indictment. Such a result does violence to petitioners' Constitutional rights to be fully informed by the indictment of all of the ele-

ments of the crime of which a defendant has been charged. *United States v. Hess*, 124 U. S. 483, 486 (1888); *Russell v. United States*, 369 U. S. 749 (1962).

Reasons for Granting Writ as to Question IV

Despite the statutory definition in 21 U. S. C. 321 (g) (1) (c) the Trial Court stated that a food could nevertheless be a drug even if the food was intended to be used to effect the structure and function of the body of man. This issue was a critical and essential part of petitioners' defense which rested on the premise that the intended use for which the food supplements were offered was to fortify the diet and improve the nutritional health of the user, and that at most, they were offered to effect the functioning and structure of the body of man, i.e., to assure that the body functioned properly, by the ingestion of a full complement of vitamins and minerals, and that, therefore, the products were foods and not drugs.

Since the Statute itself, in defining a drug, recognizes that foods which are intended to effect the structure or functioning of the body of man are not drugs, the jury should have been made aware of this distinction. One of the key issues for the jury's consideration was the intended use of the products, *i.e.*, whether the products were offered to prevent disease or whether the products were offered to improve the structure and functioning of the body of man. If, for example, the jury had found that the intended use manifested in the oral and written material was to effect the functioning of the body of man, then without an instruction as to the very distinction recognized by the Statute, the jury might well have equated a claim of improving the functioning of the body of man by the ingestion of vitamins and minerals with a claim of prevention of disease in the body of man and might then have classified the food as a drug.

The issue sought to be reviewed herein will enable this Court to clarify the relationship between "foods" intended to effect the structure or function of the body of man and "drugs" intended to prevent disease. Under the lower Court's interpretation of the Act, purveyors of food are subject to criminal liability for selling "drugs" virtually every time the benefits of the vitamin and mineral constituents of the food are stated.

Reasons for Granting Writ as to Question V

Evidence of falsity of oral statements is improper under 21 U. S. C. 352 (f) (1) because it expands the scope of the inquiry beyond the issues involved in such an offense. In effect, it converts a Section 352 (f) (1) violation into an action for fraud and purports to place in issue falsity of the manifestations of intended use, which are irrelevant to such an offense. *U. S.* v. *46 Cartons, Fairfax Cigarettes*, 113 F. Supp. 336 (D. N. J., 1953); *Alberty Foods* v. *U. S.*, 194 F. 2d 463 (C. A. 9, 1952).

The District Court committed reversible error in allowing the Government, over petitioners' objection, to offer extensive evidence of the truth or falsity of Kordel's lecture statements. This issue should be reviewed by this Court because petitioners are unable, in the light of direct precedents on the point, to understand the basis for the Court of Appeals' denial of this ground of error.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Dated: May 30, 1970.

Respectfully submitted,

SOLOMON H. FRIEND,
Counsel for Petitioners.

On the Petition,
JEROLD W. DORFMAN.

APPENDIX A

Opinion and Rulings of the District Court

* * *

Q. (By Mr. Friend) When you were before the grand jury, Mr. Fowler, you recognized that there was an element of interstate commerce to be proven in this case? A. Yes, sir.

Q. You didn't call Freshman Vitamin, who manufactured the Korleen, and you didn't call Savoy Drug and Chemical representatives, who manufactured the Frutex, did you, to testify? A. No, sir.

Q. Your testimony was you didn't call anybody?

The Court: What was the question?

Q. (By Mr. Friend) Your testimony was, sir, as I remember, that nobody except yourself appeared before the grand jury? A. Yes, sir.

Q. In actual fact, all you did was you took your big file which you had studied, and you gave the grand jury a resume of the pertinent information contained in that nice big file that you had studied the day before? A. Yes, sir, along the lines of the indictment, yes, sir, or the proposed indictment.

Q. What do you mean, along the lines of the proposed indictment? A. Well, I gave them what information we had relating to these matters as it was set forth in the proposed indictment.

[fol. 213] Q. Yes. Well, you didn't tell the grand jury what the source of that information was, did you? A. No, sir.

Q. In other words, if it was in your file, regardless of what the source of the information was, you took the

proposed indictment and you ground out the information that was in your file to fit whatever was in the proposed indictment? A. I supplied them with information available in our files which supported the proposed indictment, yes.

Q. Yes, but you didn't tell the grand jury what the source of that information was? A. No, sir, not to my recollection.

Q. If it was in your files——

The Court: Is this relevant to the point in issue here? I don't think it is.

* * *

By the Court: (at record page 2959)

This request was based on an alternative definition of "drug" contained in 21 U. S. C. Section 321 (g) (3), which was no part of the [2960] Government's charge and was therefore not involved in the case. The Court refused to give the instruction on the ground that it would amount to an instruction that if an article was a food, then it could not be drug within the contemplation of the Food and Drug Act. Such an instruction would have been clearly erroneous, since the definition of the term "drug" in 21 U. S. C. Section 321 (g) (2), relied on by the Government, makes no exception for foods. Defendants submitted no authority for their contention, which still appears untenable.

* * *

[2963] Defendants further argue that the indictment does not charge them with being aiders and abettors. However, aiding and abetting is not an element of the

offense charged, and therefore the indictment is not required to make reference to the aiding and abetting statute. Defendants cite no authority to the contrary, but instead attempt to distinguish the cases relied on by the Court in support of its instructions. Defendants say the cases of U. S. v. Koptik, 300 F. 2d 19, Londos v. U. S., 240 F. 2d 1, and U. S. v. Decker, 51 F. Supp. 20, all of which hold that an indictment need not charge a defendant as an [2964] aider and abettor under 18 U. S. C. Section 2, are inapposite because the indictments in these cases charged specific intent crimes, unlike the indictment in this case, not charging a specific intent crime. However, whether a specific intent is an element of the offense would seem not to make any difference insofar as the sufficiency of the indictment not mentioning aiding and abetting is concerned.

Defendants also overlooked the case of U. S. v. Lieberman, 15 Federal Rules Decisions 278, relied on by the Court, which stated:

> "The statement in the indictment that Lieberman did knowingly and wilfully smuggle and clandestinely introduce into the United States the diamonds would permit proof that Lieberman aided, abetted, counseled, commanded, induced, procured or caused the diamonds to be so smuggled and introduced."

The Lieberman case is clear authority that an indictment need not charge a defendant with being an aider and abettor to permit proof of aiding and abetting. Thus, the individual defendants in the instant case could properly have been found guilty by the jury as aiders and abettors although not charged as such in the indictment.

Defendants cite Morgan v. U. S., 159 F. 2d 85, a Tenth Circuit case decided in 1947, and U. S. v. Simmons, 96

U. S. 360, for the proposition that if an indictment does charge a defendant as an [2965] aider and abettor or causer, the indictment would also have to name the principal. This is an irrelevant principle, since the indictment does not in the instant case charge any defendant as an aider and abettor. The Morgan and Simmons cases are also inapposite because they involved a single defendant, while in the instant case the action is brought against three defendants, one of whom, the corporation, would clearly be a principal.

Defendants also contend that under the Court's instructions the jury would not be required to find that each defendant participated in the misbranding, if any, to arrive at a conviction. However, misbranding is only one element of the offense, and it would not be necessary to find participation in each element of the offense to convict defendants as aiders and abettors. Take, for example, the sentinel at the door of a bank is guilty as an aider and abettor even though he himself does not take the money from the bank or from the bank vault.

* * *

None of the cited grounds relied upon by defendants in support of their motion for a judgment of acquittal notwithstanding the verdict or a new trial appearing to have any merit, the motions are denied. An appropriate order may be submitted.

* * *

The Court: Members of the jury, you will recall that before we adjourned last Friday, an objection had been made to the testimony of this witness for certain legal reasons, and that counsel did argue

the matter to some extent in the presence of the jury.

After listening to the argument, I think I excused you for a while and heard arguments not in your presence, and then I took the matter under advisement and excused you for the day.

And I have heard further arguments on this matter, and I have considered the matter further, and I have overruled the objection of the defendants to this line of testimony and I hold that it is admissible. [1036] That is, when I say "it," it is proper for the Government to introduce testimony to show that certain statements made by Mr. Kordel in his lectures are incorrect, for the purpose of enabling you to determine the intended use of the product—that is, whether the product offered—more specifically, the product at the time of the specific objection was Nutri-Time, as you will recall—that this testimony would be admissible as bearing upon whether Mr. Kordel intended to sell the product as a food supplement or as a drug, and that you may consider this line of testimony in deciding that issue.

I think that perhaps other reasons were asserted at that time as bearing upon the relevancy of this line of testimony, but I am not receiving the testimony, at this time at least, for any purpose other than to enable you to determine whether or not the defendants intended the use of the product to be that of a food supplement or, on the other hand, as the Government contends, they intended it to be used as a drug within the meaning of that term as used in the statute; and, of course, that has not

been defined for you, but will be at the appropriate time.

The Government may proceed.

Q. (By Mr. Trumbauer) Dr. Orten, I would now like to read to you a statement made by the defendant Lelord Kordel on March 10, 1960 at New York. This is Exhibit No. 15, page 8:

> [1037] "Now here; what to do for soft, brittle nails that break off. You'll find that as you re-chemicalize your body—as you improve the nutrition of your body, add more protein foods, you can help your nails tremendously, but usually, you may find that there is a prolonged calcium deficiency.
>
> "Many people ask; well now, I take calcium tablets and still my nails are not in good condition. If you have been taking calcium tablets and your nails are not in good condition the chances are that you are not absorbing that calcium properly because you have not had enough organic sodium to balance out that calcium."

Now, I would like to ask you, Dr. Orten, your professional opinion as to whether it is necessary to take in extra amounts of sodium in order to aid the body in the absorption of calcium?

> Mr. Friend: Your Honor, I have an objection for the grounds previously stated.
>
> The Court: Yes.
>
> Mr. Friend: That is my objection.
>
> The Court: Objection overruled.

* * *

Appendix A

Order Filed May 4, 1970

No. 17,639

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DETROIT VITAL FOODS, INC., LELORD KORDEL and ALFRED FELDTEN,

Defendants-Appellants.

Before: COMBS, Circuit Judge, and O'SULLIVAN and CECIL, Senior Circuit Judges.

In an opinion filed February 20, 1969, this Court reversed the judgments of conviction against the defendants Lelord Kordel and Alfred Feldten. *United States* v. *Detroit Vital Foods, Inc.*, 407 F. 2d 570.

Certiorari was granted by the Supreme Court "to consider the questions raised by the Government's invocation of simultaneous civil and criminal proceedings in the enforcement of federal law." 395 U. S. 932. The judgment of this Court was reversed and the case remanded for proceedings consistent with the opinion of the Supreme Court. *United States* v. *Kordel*, —— U. S. ——; 38 U. S. L. W. 4153, February 24, 1970.

Appendix A

It was said in this Court's opinion:

> "Several grounds of assigned error were argued in briefs but we consider it necessary to discuss only one. We hold that the judgments against the individual defendants must be reversed because they were compelled to give testimony against themselves in violation of the Fifth Amendment to the United States Constitution."

Lelord Kordel and Alfred Feldten and Detroit Vital Foods, Inc., have filed motion to consider the grounds of error relied on by them and not resolved in our prior opinion.

Upon consideration, we find those grounds to be without merit. The judgments are therefore affirmed.

Entered by order of the Court:

CARL W. REUSS
Clerk

APPENDIX B

Statutes

Fourth Amendment to the Constitution of the United States states:

AMENDMENT 4

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the Constitution of the United States states:

AMENDMENT 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation.

Title 21 U. S. C. 321 (g) (1) (c)

Sec. 201 [321]. For the purposes of this Act—

(a)(1) The term "State", except as used in the last sentence of section 702(a), means any State or Territory

of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(2) The term "Territory" means any Territory or possession of the United States, including the District of Columbia, and excluding the Commonwealth of Puerto Rico and the Canal Zone.

(b) The term "interstate commerce" means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body.

(c) The term "Department" means the U. S. Department of Health, Education, and Welfare.

(d) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(e) The term "person" includes individual, partnership, corporation, and association.

(f) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

(g)(1) The term "drug" means (A) articles recognized in the official United States Pharmacopeia, official Homeopathic Pharmacopeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a

component of any articles specified in clause (A), (B), or (C); but does not include devices or their components, parts, or accessories.

Title 18 U. S. C. §2

§2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 211

DETROIT VITAL FOODS, INC., LELORD KORDEL AND ALFRED FELDTEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners Kordel and Feldten and their corporate employer, Detroit Vital Foods, Inc., were convicted on five counts of an indictment charging them with introducing into interstate commerce certain misbranded drugs and with performing acts with reference to another drug which resulted in its misbranding while it was being held for sale after shipment in interstate commerce (21 U.S.C. 331(a), (k)). Kordel (a prior offender under 21 U.S.C. 331) was sentenced to imprisonment for two years subject to the parole

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eligibility provisions of 18 U.S.C. 4208(a)(2) and was fined $10,000; Feldten was sentenced to imprisonment for one year, suspended to thirty days with three years' probation, and was fined $2,000; the corporation was fined $5,000. The court of appeals reversed the convictions of the individual petitioners on the ground that they had been denied the protection afforded by the Fifth Amendment because of the government's utilization of simultaneous civil and criminal proceedings in enforcing the food and drug law. It affirmed the conviction of Detroit Vital Foods, Inc., finding that the corporation could not assert the Fifth Amendment privilege against self-incrimination. 407 F. 2d 570. This Court denied a petition for certiorari filed by the corporation (395 U.S. 935), but granted the government's petition as to Kordel and Feldten limited to the questions raised by the parallel use of civil and criminal proceedings. 395 U.S. 932. Subsequently this Court reversed the judgment of the court of appeals and remanded the case to that court for further proceedings consistent with this Court's opinion. *United States* v. *Kordel*, 397 U.S. 1.

The previous opinion of the court of appeals, although affirming the conviction of the corporation, confined its discussion to the issues presented by the parallel enforcement of civil and criminal sanctions. 407 F. 2d at 572. On remand, petitioners filed motions to have the court consider the other grounds of asserted error relied on by them which had not been resolved in the prior opinion. The court below, "[u]pon consideration, [found] those grounds to be without merit" (Pet. App. A7–A8).

1. As petitioners note, two of the issues they presently raise—whether the indictment was invalid because of the alleged absence of any persuasive evidence before the grand jury, and whether tape recordings of petitioner Kordel's public lectures were obtained in violation of the Fourth Amendment—were previously urged in the petition for certiorari filed on behalf of Detroit Vital Foods, Inc., which this Court denied. As to those issues we rely on the discussion in our prior brief in opposition, No. 1285, O.T., 1968.

2. Petitioners also contend (Pet. Question I(b)) that the failure of the grand jury to take minutes of testimony requires reversal of their convictions. A review of petitioners' briefs in the court of appeals discloses that this issue was not relied on by petitioners prior to the remand. In any event, as petitioners recognize (Pet. 13), the Rules of Criminal Procedure do not require the recording of grand jury minutes and no court has held that recording is constitutionally required. See *Baker* v. *United States*, 412 F. 2d 1069, 1073 (C.A. 5), certiorari denied, 396 U.S. 1018; *Loux* v. *United States*, 389 F. 2d 911, 916 (C.A. 9), certiorari denied, 393 U.S. 867; *Wyatt* v. *United States*, 388 F. 2d 395, 396–397 (C.A. 10); *Schlinsky* v. *United States*, 379 F. 2d 735, 740 (C.A. 1), certiorari denied, 389 U.S. 920; *United States* v. *Hensley*, 374 F. 2d 341, 352 (C.A. 6), certiorari denied, 388 U.S. 923; *United States* v. *Caruso*, 358 F. 2d 184, 186 (C.A. 2), certiorari denied, 385 U.S. 862; see, also, *United States* v. *Napue*, 401 F. 2d 107, 112–113 (C.A. 7), certiorari denied, 393 U.S. 1024.

3. Petitioners contend that the trial judge erred in giving an aiding and abetting instruction under 18 U.S.C. 2(a). While acknowledging that normally one charged with a substantive offense may properly be convicted as an aider and abettor (see *Jin Fuey Moy* v. *United States*, 254 U.S. 189), petitioners urge that the rule should not apply where, as here (*United States* v. *Dotterweich*, 320 U.S. 277), the offenses charged do not require wilfulness or bad intent. They read the language of this Court in *Nye & Nissen* v. *United States*, 336 U.S. 613, 620, to the effect that an aider and abettor must "consciously" share in a criminal act, to mean that an aider and abettor must always have a specific intent to violate a known law. The fact that one must act consciously does not mean that there must be a finding of specific intent. Where the substantive offense contains no element of wilfulness, one may aid and abet such offense if he merely intends to assist the principal to do the forbidden act. See *United States* v. *Dotterweich*, *supra*, 320 U.S. at 284–285.

4. The essence of the criminal charges against petitioners was that, as to some of the products, certain books and leaflets written by Kordel constituted part of the labeling and contained false statements and that, as to all counts on which petitioners were convicted, the products (which were claimed by petitioners to be merely food supplements) were in fact intended by them to be used for the prevention and treatment of various conditions and diseases; that they were, therefore, drugs, the labeling of which was deficient in that

it failed to set forth adequate directions for use. The government proved Kordel's representations about the drugs principally by introducing tape recordings of his public lectures.

Petitioners urge that the trial judge erred in refusing their requested instruction that if the jury found that the products were intended to affect the structure and function of the body they were foods and not drugs; instead the court charged that a product may be *both* a food and a drug if it is offered for the cure, mitigation, treatment or prevention of disease. The instruction given was correct. The intended use of a product determines whether or not it is a drug under 21 U.S.C. (Supp. V) 321(g)(1). *E.g., United States* v. *Article * * * Consisting of 216 Cartoned Bottles * * * Sudden Change*, 409 F. 2d 734, 739 (C.A. 2) and cases cited; cf. *United States* v. *Bacto-Unidisk*, 394 U.S. 784.

5. Petitioners also contend that the trial judge erred in admitting evidence as to the falsity of representations made by Kordel during his public lectures. Petitioners do not deny that oral statements may constitute proof of the intended use of a product. As shown above, such intended use may determine whether the product is a drug within the meaning of 21 U.S.C. 321(g)(1). *Nature Food Centres, Inc.* v. *United States*, 310 F. 2d 67 (C.A. 1), certiorari denied, 371 U.S. 968; *V. E. Irons* v. *United States*, 244 F. 2d 34 (C.A. 1), certiorari denied, 354 U.S. 923; *United States* v. *Hohensee*, 243 F. 2d 367 (C.A. 3), certiorari denied, 353 U.S. 976. Thus the government was properly permitted to introduce Kordel's public representations

about the products on the issue of petitioners' intended use. In the context of this case, where the lectures were sprinkled with many disclaimers to the effect that the products were dietary supplements, it was important to present the entire setting in which Kordel offered these products, including the falsity of the disclaimers. For example, as to one product, Nutri-Time, Kordel's words implied that the drug was offered as a dietary supplement to replace in the body those minerals which are "sponged up" by white sugar. But the fact is that white sugar does not "sponge up" materials. The trial judge therefore did not abuse his discretion in permitting the government to introduce proof of the misrepresentation for its bearing on the purpose for which Kordel was offering the product at the time. See *Research Laboratories, Inc.* v. *United States*, 167 F. 2d 410, 420 (C.A. 9), certiorari denied, 335 U.S. 843.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1970.

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